In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1325

JOHN A. NARD, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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MISCELLANEOUS

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The petitioner John A. Nard respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on February 23, 1977.

OPINION BELOW

A copy of the judgment order of the court of appeals appears in the Appendix hereto. No opinion was rendered

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on February 23, 1977 and this petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1)

QUESTION PRESENTED

Whether the denial to an evidentiary hearing on the factual issues presented in appellants motion to withdraw a plea of Nolo Contendere, where the factual issue if proven,

would constitute the "manifest injustice" referred to in Rule 32, FEDERAL RULES OF CRIMINAL PROCEDURE, is contrary to existing law.

STATUTORY PROVISION INVOLVED

UNITED STATES CODE, Title 18, Rule 32(c)(3)d

> A motion to withdraw a plea of guilty or *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

STATEMENT OF THE CASE

This matter comes to this honorable court upon an appeal from an order of Judge Barron P. McCune of the Western District of Pennsylvania denying, without a hearing, a "motion to withdraw Defendant's plea of Nolo Contendere", filed by appellant, pursuant to Rule 32, FEDERAL RULES OF CRIMINAL PROCEDURE, after sentence on three counts involving income tax violations.

Appellant, John A. Nard, hereinafter called Nard, was indicted on July 26, 1973, and charged with two violations of Title 26, UNITED STATES CODE, §7203, wilful failure to make income tax returns, and one violation of 26 U.S.C. §7201, wilful attempt to evade and defeat income tax due and owing.

Following extended argument in regard to a defense motion for Bill of Particulars, Nard, on February 11, 1974, entered a change of plea, pleading guilty to counts 1 and 2 charging 7203 violations and pleading Nolo Contendere to count 3 charging the 7203 violation.

Sentence of 36 months imprisonment was suspended and Nard was placed on probation for 36 months and fined

$10,000 on count 3. Sentences on counts 1 and 2 were made to run concurrent with that imposed on count 3.

Only the count 3 plea of nolo and the conviction thereon is in question in this appeal.

On August 18, 1975, a prior motion to withdraw the Nolo Contendere plea was filed and subsequently amended (pp. 8a-13a of appendix). Following the filing of an answer by the government on September 9, 1975, the court, on September 11, 1975, denied, without hearing, Nard's motion. No appeal was taken from that denial.

On August 25, 1976, another motion to withdraw the Nolo Contendere plea was filed. On August 27, 1976, prior to any response by the government, Judge McCune denied the motion without hearing it. The action was then appealed to the United States District Court of Appeals for the Third Circuit. On February 23, 1977 the Court of Appeals, without issuing an opinion, entered a Judgment Order, sustaining the decision of the District Court.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the decision of other courts of appeals as to the meaning of "manifest injustice" which Rule 32, FEDERAL RULES OF CRIMINAL PROCEDURE was designed to correct and would entitle appellant to withdraw his nolo plea.

If proven, the appellant's factual allegations would constitute the "manifest injustice" which Rule 32, FEDERAL RULES OF CRIMINAL PROCEDURE was designed to correct and which would entitle appellant to withdraw his nolo plea.

The motion of appellant to withdraw his plea (appendix, p. 18a) was based primarily on the following propositions:

a. That he entered the plea on the mistaken belief, fostered by his counsel, that he could withdraw it at a later time;

b. That upon his counsel's advice, in combination with representations of the United States Attorney in Iowa City that his testimony was necessary to a grand jury investigation, appellant determined to withhold testifying in his own defense in order not to reveal testimony necessary to the grand jury investigation; and

c. That evidence obtained by the appellant long after the entry of the plea and previously unavailable to him indicated that the tax evasion charge resulted from payments made by Armour and Company to various subcontractors, which payments were made for the purpose of creating the appearance of income to appellant.

Appellant contends that, if true, these allegations warranted the District Court in opening the judgment of appellant's conviction and permitting him to withdraw his previously entered plea of Nolo Contendere.

As noted by this court in *United States v. Shneer*, 194 F.2d 598 (3d. Cir., 1952), a "manifest injustice" case, "We agree with the defendant that the critical issue now is whether he changed his plea in reasonable reliance upon the represented information, limiting the issues to the fact that the misrepresentation, however innocent, was made by the defendant's counsel, on officer of the court." at page 600.

It is clear in this circuit, therefore, that if the appellant affirmatively was misled by his counsel, he may be permitted to withdraw his plea. See also dissent of Judge Frank in *U.S. v. Parrino*, 212 F.2d 919 (2nd Cir., 1954), at page 922, which dissent is cited with approval in Moore, FEDERAL PRACTICE, Volume 8A, paragraph 32.07(3)(6),

p. 106, and which dissent cites *Shneer, supra*, as well as the subsequent district court opinion, *U.S. v. Shneer*, 105 F. Supp. 883 (U.S.D.C. E.D. Pa.)

Although the general rule prevails that a motion such as appellant's is directed to the sound discretion of the district court judge, *U.S. v. Nigro*, 262 F.2d 783 (3d Cir., 1959); *Ford v. U.S.*, 418 F.2d 855 (8th Cir., 1969), appellant argues that if in fact appellant's counsel at the time of the entry of the plea *did* advise appellant that he could always withdraw a *nolo* plea at a later time, and if appellant relied on that advice in entering the plea, such a circumstance could reasonably justify a court in concluding that appellant was affirmatively misled by defense counsel, an officer of the court, within the meaning of *Shneer, supra*.

Since appellant's allegation, if proven, would have entitled him to withdraw his plea, the District Court abused its discretion in denying appellant's motion without requiring an answer from the U.S. Attorney and conducting a hearing on any disputed facts.

Inasmuch as appellant, under *Shneer*, would have been entitled to withdraw his plea if he could prove he had been affirmatively misled into entering the plea, appellant contends that he should not have been denied the opportunity to prove that he was so misled.

In the instant case, the motion of the appellant was denied even before the United States Attorney filed an answer thereto. No fact allegations, therefore, were even put in issue.

Presumably, the United States might have filed a response similar to that filed on or about September 9, 1975, in response to the amended motion of appellant on August 21, 1975. In that response, which also resulted in an order denying without a hearing, appellant's motion, certain

representations of the government are made concerning statements made by appellant's counsel as well as the status of the Iowa Grand Jury proceedings. A reading of the entire record, including other motions, documents and testimony, however, fails to indicate any evidentiary support whatever for the government's conclusions. Surely where, as here, the allegations of the appellant, if true, would entitle him to the relief sought. The District Court should either grant appellant's motion or require any factual issues to be defined.

Appellant relies for this proposition on the opinion of the Supreme Court of the United States in *Machibroda v. United States*, 368 U.S. 487 (1962), wherein the appellant alleged that his plea was entered as the result of an agreement between he and the U.S. Attorney as well as threats by the U.S. Attorney regarding other charges.

The District Court judge received a response from the government containing factual responses to appellant's allegations, thus creating controverted factual issues which required resolutions.

The Supreme Court held that the District Court had erred in failing to grant a hearing on the controverted issues of fact, noting:

> This was not a case where the issues raised by the motion were conclusively determined either by the motion itself or by the "files and records" in the trial court. The factual allegations contained in the petitioner's motion and affidavit, and put in issue by the affidavit filed with the government's response, related primarily to purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light. Nor were the circumstances alleyed of a kind that the District Judge could completely resolve by drawing upon his own personal knowledge or recollection. 368 U.S. at 494-5.

As the court also noted, at page 496, where the allegations of the appellant, even if improbable, cannot be said to be incredible, the appellant is entitled to a hearing. Cf. also, *U.S. ex. rel. McGrath v. La Valee*, 319 F.2d 308 (2d Cir., 1963).

Appellant further calls the attention of the court to its opinion in *United States v. Mainer*, 383 F.2d 444 (3rd Cir., 1967), in which the court considered even an "informal hearing" with unsworn testimony to be insufficient:

> "The court acted on colloquies between contending parties at what it considered an argument, when in fact the proceeding before it was an adversary one which required the following of at least the rudimentary prodcedural channels for the determination of disputed questions of fact. Instead the proceeding resembled a discussion on sentencing, with a plea for relief presented to the court by appellant in a kind of extra-judicial narrative, and opposition to it expressed in similar narrations by his former counsel and the Assistant United States Attorney. To permit this was error, for the proceeding was in effect a trial to determine whether appellant's charge, on which he had the burden of proof, was true or false."

The Court of Appeals for the District of Columbia Circuit followed *Mainer* in this regard and noted:

> "The rule is that when, as here, an effort is made to withdraw a guilty plea before sentence the defendant is entitled to an appropriate hearing before the application can be denied. Where factual matters bearing directly on the plea are truly in controversy, an oral colloquy is not an acceptable vehicle for resolving them. In this instance, the subjects of appellant's mental state and his understanding of his action at the time of the pleas should have been dealt with, not in the form of colloquy or argument, but by 'the following of at least

the rudimentary procedural channels for the determination of disputed questions of facts.' United States v. Mainer, 383 F.2d 444, 447 (3d Cir. 1967)."

Appellant perceives no reason for distinguishing between withdrawal of pleas before or after sentence on the issue of the nature of the proceedings in which the defendant may prove his allegations. If the allegations would, if proven, justify withdrawal of the plea, then appellant should not be deprived of the opportunity to prove them.

In the instant, appellant has never had an opportunity to prove his contentions in any proceeding. The initial motion was denied upon answer of the government. No answer was even required of the government before the denial appealed from.

Further, a reading of the transcript of proceedings at the change of plea on February 11, 1974 cannot be said to be conclusive against appellant's motion.

The transcript of the entry of the plea on February 11, 1974, cannot conclusively determine any of the issues in this case against appellant since appellant did not plead guilty and gave no information to the court on the issues raised in this case.

A review of the transcript of the entry of the plea on February 11, 1974, indicates that the plea entered to the charge contained in Count 3 of the indictment was a plea of nolo contendere, and *not* a plea of guilty.

Accordingly, the usually expected judicial extraction of confession from the defendant did not take place, and at no time during the colloquy did Mr. Nard indicate that the reason he was entering a plea was because he was guilty. Moreover, the transcript cannot be interpreted as indicating that Mr. Nard was pleading no contest because he in fact had no defense. On page 8 of the transcript (Appendix p. 32a),

Mr. Nard indicates as follows in response to the court's questions:

THE COURT: With respect to the third count, it states that on or about December 15, 1969, you attempted to evade and defeat a part of your income tax due, which was due to the United States by preparing or causing to be prepared and signed or causing to be signed a fraudulent income tax return. You state you enter a plea of nolle contendre. That means you have no defense to this charge. Do you so plead?

MR. NARD. I think the charge is false, but I have no defense for it. I mean—I am not making a defense for it.

THE COURT: You agree you are not filing any defense?

MR. NARD: No, I am not filing any defense.

THE COURT: To this charge? Do you so agree?

This is, in essence, the sum total of testimony taken concerning the nolo plea specifically. None of that testimony can be in any way said to contradict any of appellant's allegations in the motions to withdraw the plea.

Other portions of the transcript indicate only that appellant entered the plea on advice of counsel, and that he was concerned about testifying before a grand jury.

All-in-all, the colloquy which is set forth cannot be said to contain a clear explanation that even an educated defendant would understand concerning the nature and effect of a plea of nolo contendere, and it is conceivable that the legally-educated persons present made certain unsupported assumptions about what appellant's concept of his actions was at the time his plea was entered. Appellant's allegation that he believed he could withdraw his plea at a later time, if true, evidences a lack of understanding on appellant's part about the nature of the nolo plea. To the

extent that appellant alleges he entered the plea because his attorney indicated he could withdraw it at a later time, appellant may have made out a sufficient case to warrant the conclusion that his attorney affirmatively misled him. *Cf. United States v. Parrino*, 212 F.2d 919 (2nd Cir.) *cert. denied* 348 U.S. 840, 75 S. Ct. 46, 99 L.Ed. 663 (1954); *Kienlen v. United States*, 379 F.2d 20 (10th Cir., 1967).

In the other direction, the transcript fails to reveal that the judge sought to satisfy himself that there was a factual basis for plea and no explanation was made to appellant which would have informed him that the plea of nolo was of the same force and effect in the criminal proceeding as the plea of guilty. (Cf. Rule 11(f) of the FEDERAL RULES OF CRIMINAL PROCEDURE).

A reading of the transcript will further indicate that the usual reasons given for great circumspection and hesitancy in allowing a defendant to withdraw a plea *after* sentence do not apply in this case.

As noted in *Kadwell v. United States*, 315 F.2d 667 (9th Cir., 1963), at 670:

> ...if a plea of guilty could be retracted with ease *after* sentence, the accused might be encouraged to plead guilty to test the weight of potential punishment, and withdraw the plea if the sentence were unexpectedly severe. The result would be to undermine respect for the courts and fritter away the time and painstaking effort devoted to the sentencing process.

These considerations do not apply in the instant case. The sentence was known in advance by the defendant and was part of a plea bargain of which the court was aware. (Appendix, pp. 27-28a). There is no indication at all, therefore, that the withdrawal motion is motivated by the surprise of the defendant as a result of an unexpectedly severe sentence.

Appellant argues, therefore, that the transcript of the entry of the plea affords no basis upon which the court could deny without a hearing appellant's motion to withdraw his plea.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Third Circuit.

Respectfully submitted

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APPENDIX

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 76-2221

UNITED STATES OF AMERICA

vs.

JOHN A. NARD,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(CRIM. NO. 73-188)

Submitted under 3rd Cir. Rule 12(6) February 17, 1977
Before MARIS, GIBBONS and GARTH, *Circuit Judges*.

JUDGMENT ORDER

In this appeal from the denial of a motion for leave to withdraw a nolo contendere plea to a charge of attempting to evade and defeat income tax, 26 U.S.C. §7201, the defendant Nard contends that the district court erred in denying the motion without holding an evidentiary hearing. On the record in this case there were no material facts in dispute respecting the voluntariness of the plea, and no need for an evidentiary hearing. We find no abuse of discretion in the denial of the motion.

It is ORDERED and ADJUDGED that the order of the district court be and it is hereby affirmed. No costs.

By the Court:

/s/ JOHN GIBBONS

Circuit Judge

Attest:

/s/ THOMAS F. QUINN

Thomas F. Quinn, *Clerk*

Dated: Feb. 23, 1977